SINGAPORE REPORTS.

HONG CHEOK LAM
v.
ONG SING MAI AND 4 OTHERS.

[App. Civ. Juris. (Murray-Aynsley, C.J.)
February 1, 1951]

[Singapore — District Court Appeal No. 4 of 1951]

Landlord and tenant — Breach of terms of tenancy against sub-letting — Notice to Quit complied with by principal tenant but not by sub-tenants — Whether acceptance of rent after knowledge of the breach amounts to waiver of right of re-entry — Control of Rent Ordinance, 1947.

The plaintiff/respondent let the premises known as No. 31 Desker Road, Singapore, on a month to month tenancy to one Lim Chiang Chew who in breach of the terms of tenancy against sub-letting, sub-let parts of the said premises separately to the first, second, third and fourth defendants/appellants.

On the 7th November, 1949, the respondent's solicitors wrote to the principal tenant complaining against the prohibited sub-letting.

On the 2nd December, 1949, a Notice to Quit was served on the principal tenant. Before the expiration of the said Notice to Quit the respondent accepted rents which had accrued due after the 7th November, 1949 (the date of complaint of the breach).

The principal tenant complied with the Notice to Quit but the appellants refused to quit. The respondent thereupon commenced proceedings against them for the recovery of possession on the ground, **inter alia**, that the sub-tenancy was prohibited by the terms of the tenancy.

The appellants contended that even if the terms of the tenancy prohibited sub-letting there was a waiver of the breach by the respondent's acceptance of rent from the principal tenant during the continuance of the contractual tenancy after knowledge of the breach.

The learned District Judge held that sub-letting was prohibited and that the acceptance of rent in the circumstances stated above did not amount to a waiver.

Held, on appeal, that the acceptance of rent after knowledge of the breach amounted to a waiver of the right of re-entry.

Norman v. Simpson[1] followed.

Case referred to:—

(1) *Norman v. Simpson* (1946) K.B. 158.

APPEAL from Civil District Court.

K. K. Bezboruah for the appellants/defendants.

N. N. Leicester for the respondent/plaintiff.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — This appeal raises a point under the Control of Rent Ordinance of 1947. The facts are simple. The premises were let to one Lim Siang Chew. The learned District Judge has found as a fact that the terms of the letting forbade sub-letting. I am not prepared to disturb this finding. Later the landlord discovered this sub-letting and thereupon gave notice to quit. Before the expiry of the notice and during the continuance of the contractual tenancy the landlord received rent. Now the law on this point is clear. The affirmation of the tenancy after knowledge takes away the right of re-entry. It has been further held in the English case of *Norman v. Simpson*[1] that this has the effect of making the original sub-letting lawful. This was a majority decision of the Court of Appeal. du Parcq, L.J. dissented and if I had not had the advantage of seeing the judgments of the Lords Justices I should have decided the case on the lines of his judgment. I still feel unconvinced. No doubt in ordinary cases if the landlord lost his right of re-entry he was left without a remedy. The right of re-entry is, however, quite another thing from a right of action for damages for breach of contract. And where the breach of a condition had a remedy in damages there is logically no reason why the right should be affected by the loss of the right of re-entry. Even where there is no remedy in damages it does not seem to follow that the affirmation of the tenancy has the effect of making the sub-letting lawful. However, I must bow to superior authority and it is desirable, where possible, for the Courts of this Colony to follow the decisions of the Court of Appeal in England.

The next question is whether the difference in the wording of our local ordinance affects the meaning. In our Ordinance the words are "where the tenant was not prohibited from sub-letting by the terms of his tenancy." In England the words are "any sub-tenant to whom the premises . . . . have been lawfully sub-let". Now in ordinary cases lawful or unlawful depends entirely on the terms of the contract. If it is lawful to sub-let it is so because sub-letting is not prohibited by the contract between landlord and tenant.

If therefore acceptance of rent renders the sub-letting lawful it is because the law treats the acceptance of rent as impliedly altering the terms of the contract to this extent. I think, therefore, that for the present purpose the effect of the different words in the two enactments is the same.

The appeal must be allowed with costs.

Appeal allowed.

REX v. KOH HAI SUI.

[Orig. Crim. Juris. (Evans, J.) December 8, 1950]

[Singapore — Assize Case No. 56 of 1950]

Singapore Essential Regulations Proclamation, Regulations 34 and 81 — Prohibition of Imports Order,

1948 — Order ultra vires the powers of the authority purporting to make it.

The Singapore Essential Regulations Proclamation Regulation 34 empowered the competent authority to make orders to prohibit the import or export of any article "so far as appears to him necessary for the protection of the public or for the maintenance of supplies and services essential to the community". The Prohibition of Imports Order 1948 did not on the face of it show that the competent authority had adduced himself to the question of what is necessary for this Colony or exercised the discretion required by the Regulation. It purported to prohibit all imports save under licence.

Held, that the Order was **ultra vires** the powers of the competent authority and was therefore void.

Cases referred to :—

(1) *Rex v. Rotherham Licensing Justices* (1939) 2 All E.R. 710.

(2) *Rossi v. Lord Provost of Edinburgh* (1905) A.C. 21.

(3) *Liversidge v. Sir John Anderson and another* (1942) A.C. 206.

(4) *Greene v. Secretary of State for Home Affairs* (1942) A.C. 284.

(5) *Green's case* (1942) 1 K.B. 112.

(6) *Budd's third case* (1943) 2 All E.R. 452 at p. 454.

(7) *Stuart v. Anderson and Morrison* (1941) 2 All E.R. 665.

(8) *Rex v. Brixton Prison (Governor), Ex parte Pitt-Rivers* (1942) 1 All E.R. 207.

CRIMINAL TRIAL.

A. V. Winslow (D.P.P.) for the Crown.

Wee Chong Jin for the accused.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Evans, J. : — The defendant on this prosecution moved in arrest of judgment on the ground that the Order, under which he was charged, was illegal, being *ultra vires* of the powers of the authority purporting to make it. The matter is one which should have been raised on the plea, but was not mentioned until the jury had been sworn and the accused given in charge. So I intimated that in the circumstances it would be better to move in this way.

The act charged is said to be in contravention of section 3 (1) of the Prohibition of Imports Order, 1948, which contravention is an offence under Regulation 34 by virtue of and punishable under Regulation 81 of the Singapore Essential Regulations Proclamation. All this is supposed to be intelligible to and known by every citizen of Singapore. The Proclamation purports to be made by the Chief Civil Affairs Officer of the British Military Administration under powers delegated to him, and the validity of the Proclamation and its continuance in force are not here disputed. Regulation 81 is merely a general penalty provision. Regulation 34 provides :—

34.(1) A competent authority, so far as appears to him necessary for the protection of the public or for maintenance of supplies and services essential to the community, may by order provide for the prohibition or restriction absolutely or conditionally of the import or export of any article, animal, substance or property whatsoever or of any class or description thereof.

* * * *

(3) An order made under this regulation may vest in any officer or person an absolute discretion as to the issuing and cancellation of any permit or licence for which provision is made in the order, the terms of any such permit or licence and the conditions subject to which it is issued and thereupon the exercise of any such discretion shall not be called in question in any Court.

(4) If any question arises as to whether any article, animal, substance or property is an article, animal or substance, or is property, to which any order under this regulation applies, the decision thereon of the authority by whom the order was made shall be final and conclusive and shall not be called in question in any Court.

These provisions, it was argued, require the competent authority to consider which goods should be excluded or restricted, and sub-regulation (4), which speaks of order and not of licence, implies that a list of such goods must be made, the interpretation of which list is reserved to the Authority. In fact the competent authority made the Prohibition of Exports Order, 1946, which schedules precisely such a list. Thereafter he went on to make the Prohibition of Imports Order, 1948, which is of a totally different character, and which, on the face of it, shows that the competent authority has not addressed his mind to the question of what is necessary for this colony, nor exercised the discretion required. Counsel for defendant went on to cite *Rex v. Rotherham Licensing Justices*[1] and *Rossi v. Lord Provost of Edinburgh*[2]. It was contended on behalf of the Crown that the Order of 1948 is not a blanket order, and that the method adopted by making this order and the licence of 11th August, 1948, which variously describes itself as a licence or declaration, is an easier method of proceeding.

The construction of provisions conferring powers upon a subordinate officer of Government not infrequently raises questions of some difficulty, more especially where the language used seems to go on to impose some limitation or condition on the powers granted. Similar questions have been frequently considered, and have been taken to the highest tribunals, in connection with the detention of persons during the war under Regulation 18B of the British Defence Regulations. The leading case is that of *Liversidge v. Sir John Anderson and another*[3]. In that case the meaning of the clause "If the Secretary of State has reasonable cause to

believe etc." . . . . where the expression is used as a condition of the power to order detention was considered. In the latter case of *Greene v. Secretary of State for Home Affairs*[4], Lords Maugham and Romer stated that the earlier case decided that these words in this context meant "if (the Secretary of State) is of opinion that there is such cause". This is the proposition which Lord Atkin so strongly criticised in his dissenting judgment, but it was not adopted by Lords Macmillan and Wright in the earlier case, nor do they subscribe in the later to the opinion that this is what the earlier case decided. Nor one may note does the editor of the Law Reports seem to consider that the earlier decision could be so readily summed up. What exactly *Liversidge's* case decided need not detain us, as the words in this case differ radically. What all the Lords in the majority agreed was that the fact that the power was to be exercised in time of war and was limited to such time must affect the interpretation to be put upon the words used. Lord Macmillan, as I understand him, thought that the Secretary of State exercised some kind of quasi-judicial power from which there was no appeal. Lord Wright spoke of respondents being "invested with a duty and discretion in their office as ministers" (page 259) and of the matter being one of "executive discretion" (page 267). Lord Goddard whose judgment was approved used similar words in the Court of Appeal in *Greene's case*[5], saying "the Secretary of State in making these Orders acts wholly in an executive and not in a judicial capactiy".

In both these cases the terms of the grant had been complied with and the Orders made were formally correct. The orders in the case there reviewed seem mostly to have contained a recital of facts satisfying the condition. In neither of the orders before me is there any profession of having complied with the condition. The wording of that condition is "so far as appears to him necessary for the protection of the public or for maintenance of supplies and services essential to the community." There is here therefore none of the uncertainty arising both from the natural meaning of words used, and from their similarity to words used in certain Statutes, which attached to the words in the English Regulation 18B. The intention of the Chief Civil Affairs Officer clearly is that certain circumstances should appear to the competent authority to exist, not that such circumstances should in fact exist. The ascertainment, and appreciation of the circumstances, and more particularly of their tendencies is very much a matter of opinion, and the opinion of the competent authority is the opinion which is to prevail. I have no doubt if the competent authority contented himself with exercising the powers granted, the orders he made could not be attacked on the ground that a court or any one else took a different view of the circumstances, or that later events showed that his own views were in fact mistaken.

What is it that he is empowered to do? He certainly can make orders of an executive nature prohibiting or restricting individual importations. He may go further and make orders prohibiting the "import" of a class of goods. In each case he should act for the protection of the public or for the maintenance of essential supplies or services.

To understand the nature of the power conferred these words must be considered, whatever the effect of their disregard may be, and on whomsoever the proof of that disregard may lie. The court should also consider the circumstances in which the power was granted, and the evil which it was designed to meet. This consideration of the circumstances is put in the forefront by all the Lords in the majority in *Liversidge's* case, as it would seem to be by all the judges and Lords Justices considering this aspect of the cases. This power was created at a time when the country had been recently liberated, when all forms of trade had been starved, and when there was a famine of many commodities. The powers were to prohibit or restrict either importation or exportation. The value of a prohibition of exports in such circumstances and for the purposes prescribed is obvious. The prohibition of importation of certain goods such as arms, dangerous drugs and so forth would, doubtless be for the public safety. It is true that these matters are covered by specific legislation, but this Regulation 34 clearly contemplates that duplicating provisions may be made thereunder. How restriction can effect the purposes contemplated is less obvious, but a balanced importation was doubtless desired and necessary, and at that time the authority under which the Chief Civil Affairs Officer acted was responsible for several other commodities than that now alone in question. There appears no need in these circumstances and for these purposes to make orders outside the kinds already defined. The language is not apt to cover other kinds nor am I given any reason for stretching the language in these times, except that in the opinion of the grantee of the power or of Counsel it is "easier". This is no legal reason at all.

Among the cases under Regulation 18B are three brought by Capt. Budd. In the first he was successful in obtaining a Writ of *Habeas Corpus*. That case is

unfortunately unreported. Scott L.J. refers to it in *Greene's* case at page 103 in the course of a discussion of the recent cases accepted by the House of Lords. From this reference it might appear that the exercise of the power was bad because, instead of the Secretary of State's order being served on the detainee, he was served with a short resume signed by someone else, and inaccurately setting out the order; or, more particularly because it was an essential requirement of the regulation that the prisoner should be informed truly of the ground of the order made. This case was further considered in *Budd's third case*[6], an action for false imprisonment based on this earlier imprisonment. Asquith J. therein ascribes the reason apparently referred to by Scott L.J. to Singleton and Tucker JJ., and to Humphreys J. three reasons "first, that 25 persons were dealt with *en bloc*. hence the Home Secretary could not have given individual attention to each case; secondly, that the order failed to recite that the Home Secretary thought it necessary to exercise control over the plaintiff, and thirdly, that the Secretary of State had no reasonable grounds for detaining him, by which Humphreys, J., meant no objectively reasonable grounds for detaining him. These objections have since been disposed of respectively by the decisions of the Courts in *Stuart v. Anderson and Morrison*[7], *Rex. v. Brixton Prison (Governor), Ex parte Pitt-Rivers*[8], and *Liversidge v. Anderson, supra.* So clear is this that counsel for the plaintiff was forced to concede that the Home Secretary's order of June 11 was a valid order." Despite Counsel's admissions in that case I doubt if such arguments can be disposed of generally in this manner. A defect in an order may not by itself be fatal. It does not follow that a number of such defects may not be fatal, nor that they are not evidence of something else *i.e.* of the misuse of the power. In fact on the learned Judge's own quotation Humphreys J. did not hold that the order was bad because of the number, but for want of the exercise of the required discretion, of which this was evidence, which the Judge would apparently regard as conclusive evidence. Conversely in *Stuart's* case, *supra,* Tucker J. did not hold that though no discretion were used the order was good, but that the order was not bad because of an unspecified number of names appearing in the schedule, which number may well have been less than twenty-five. Similarly had the procedure in *Budd's* original case been followed in *Greene's* the mistake in the notice of right to object could hardly have been cured, or have been ineffective upon, the earlier order signed by the Secretary of State for no such order had been served on Budd. No Judge held that the defect was in no circumstances bad, but that it could not vary or annul a good order previously served. The number of persons dealt with is clearly a matter of degree, and the strength of any natural presumption that each case had not been separately considered increases proportionately.

Asquith J. does not deduce a general *ratio decidendi* from *Liversidge's* case. He says with regard to it at page 456[6] :—

> "Liversidge v. Anderson, though in form a decision on particulars, is in substance, if I may quote from Lord MacMillan at page 258 ((1941) 3 All E.R. at page 370) a decision that
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> . . . the production by the Secretary of State of an order of detention by him ex facie regular and duly authenticated . . . constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective or otherwise invalid."

I do not find that the mere want of a recital to the order here in question is fatal, but it seems to me a defect. Had the competent authority remedied that defect, he must have committed himself to some such recital as : — "Whereas for the purpose of maintaining the supplies and services essential to the community it appears to me necessary to prohibit all imports", an argument which I should have thought no rational man with any regard for the truth could subscribe. This would have drawn the authority's attention to the fact that what he was trying to do is outside the powers conferred, and fundamentally different from the intent of the grant. As Mr. Wee points out the grant does not read "any class or all classes" not merely because such wide powers were not granted but because such action as has been taken was not for a moment contemplated. The power seems to be to make orders of the kind which I have before mentioned, and which seemed probably required in the prevailing circumstances. The power is purportedly used to establish a general and standing body of laws governing imports; to legislate on a large scale. I can see nothing in the documents before, in the circumstances, and less still in the authority for these Regulations, which would require any meaning wider than the natural meaning to be attached to the words of Regulation 34.

These Proclamations all depend on the Kandy Proclamation (No. 1) and it might be doubted whether any legislative power was, or could be claimed, thereby beyond what was necessary to an occupying army. They may have attained some other legal force by virtue of the Singapore Colony Order in Council 1946, but this could not alter the nature of the power already granted in these Regulations.

The consequences of the use made of the power seem to show the same. A licence is usually personal and particular. Regulation 34(3) confers power upon the Competent Authority to authorise an officer or person to issue permits or licences as exceptions to the orders made. Such authorisations would not cover licences and permits issued in such manner or upon such a scale as to render the order nugatory. In this case the Competent Authority himself made the second instrument, but the procedure implies that the Competent Authority claims to be empowered to delegate to anyone he chose power to make an instrument of the extensive character of this licence; that is to delegate wide legislative powers. This second instrument should have been a permit or licence; it so obviously is not that the Competent Authority seems to have been at some loss to know what to call it, and it is therefore called indifferently a "general licence" then a "declaration" and later again a "general licence", but its official title is "Declaration".

In the case cited by Mr. Wee against the Rotherham Justices a similar mistake was made as regards different powers. The power there granted was, as might be supposed, a judicial discretion, but the exercise was of no such discretion in individual cases, deciding each on its merits in the light of its own circumstances, instead the Justices enacted a rule to bind themselves, and through themselves and indirectly, but only indirectly, purported to amend the licensing laws in their own borough. This was a misuse of their power. Their "rule" was declared bad and they were required to hear the applicant's case. Powers of legislation can only be acquired by a clear and express grant and a power to change the general laws of the country are not to be so lightly assumed.

In my opinion therefore the motion is well founded. No judgment should be entered on the verdict, but the proceedings must be set aside, and a judgment of acquittal recorded.

Accused acquitted.

In re WESTERLING.

[Orig. Crim. Juris. (Evans, J.) August 15, 1950]

[Singapore — Originating Motion No. 57 of 1950]

Prohibition — Order of — Extradition proceedings — Practice and Procedure — English R.S.C., O. 59 r. 3(2) — Extradition Acts, 1870 to 1932 — Effect of statement by executive officer with regard to treaties with foreign States.

This was an application by one Raymond Paul Pierre Westerling who was the subject of extradition proceedings commenced at the instance of the Republic of the United States of Indonesia and which were pending before the District Judge and First Magistrate. The applicant applied by Originating Motion for leave to apply for an Order of Prohibition directed to the First Police Magistrate and District Judge of the Colony of Singapore to prohibit him from further proceeding in an application entitled "Extradition Case No. 1 of 1950" which was pending in the first Criminal District Court of the Colony of Singapore against him.

It was submitted on behalf of the applicant (1) that there was no extradition treaty existing between His Majesty's Government and the Republic of the United States of Indonesia and that therefore the rights and benefits provided by the Extradition Acts 1870 to 1906 were not available to the Government of the Republic (2) that even if such an extradition treaty existed no Order in Council had been made applying the extradition acts to the Republic of the United States of Indonesia.

Counsel for the Government of the Republic of the United States of Indonesia raised a preliminary objection to the application contending that the motion paper relating to the ex parte motion for leave to apply for the order sought was not accompanied by any statement in accordance with Order 59 rule 3(2) of the English Rules of the Supreme Court. It was also contended on the substantial matters in issue that the Government of the Republic had succeeded to the rights and benefits of extradition enjoyed by the Netherlands Government.

The Attorney-General appeared at the hearing and handed in the following statement:

> "I have to inform the Court on the authority of the Secretary of State for Foreign Affairs that the Republic of the United States of Indonesia has succeeded to the rights and obligations of the Kingdom of the Netherlands under the Anglo-Netherlands Extradition Treaty of 1898 in respect of Indonesia and that the said Treaty now applies between His Majesty's Government in the United Kingdom and the Republic of the United States of Indonesia."

and contended that the question of whether the Crown is in Treaty relations with a foreign state is a matter on which the Court should seek guidance from the appropriate department of the Executive, and whatever may be certified as His Majesty's view of the matter in reply is, not merely evidence of the fact, but is conclusive evidence.

Held, (1) on the preliminary objection that the portion of the Motion paper setting out the grounds of the application could be treated as a statement sufficient to satisfy in the Colony the requirements of Order 59 rule 3(2) of the English Rules of the Supreme Court; (2) whenever the treaty relations of the Crown with a Foreign State are in issue, the Court should seek guidance from the Executive whose views must be taken as conclusive evidence; (3) the views of the Executive on treaty relations may be volunteered to the Court and where the Attorney-General appears and states those views, such statement is equally conclusive evidence; (4) the application of the Extradition Acts depends not only on the existence of an appropriate Treaty but also on an appropriate Order in Council: the statement of the Executive showed that a treaty existed between His Majesty's Government and the Government of the Republic but there was no Order in Council applying the Extradition Acts to the Republic of the United States of Indonesia in regard to the Treaty and accordingly the Courts of the Colony had no jurisdiction to act on any requisition, for the surrender of a fugitive offender, made by the Government of the Republic.

Cases referred to:—

(1) *Duff Development Co. Ltd. v. Government of Kelantan* (1924) A.C. 797.